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In the Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 111, PETITIONER

v.

COLORADO-UTE ELECTRIC ASSOCIATION, INC. AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JERRY M. HUNTER
General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that an employer violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by implementing upon impasse a merit pay proposal that granted it complete discretion over the timing and amount of individual wage increases.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 939 F.2d 1392. The decision and order of the National Labor Relations Board (Board) (Pet. App. 29a-43a) and the recommended decision of the administrative law judge (ALJ) (Pet. App. 46a-94a) are reported at 295 N.L.R.B. 607.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1991. A petition for rehearing was denied on

September 24, 1991. Pet. App. 96a-97a. On December 16, 1991, Justice White extended the time within which to file a petition for a writ of certiorari to and including January 22, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, International Brotherhood of Electrical Workers, Local No. 111 (Union) and respondent Colorado-Ute Electric Association (Company) were parties to a collective bargaining agreement covering office and clerical employees. Under the agreement, wage rates for each job classification were determined by seven progression steps. Employees advanced from step to step at established intervals. In late July 1984, the Company and the Union began midterm wage negotiations under the collective bargaining agreement's wage reopener provision. The parties held nine bargaining sessions during July and August. During those sessions, the Union insisted on an across-the-board wage increase for unit employees. The Company insisted that any wage increase be instituted under a merit program. Pet. App. 30a-31a, 53a-60a.

At the parties' tenth bargaining session on September 5, 1984, the Company presented the Union with a written proposal that it described as its "final offer." The proposal retained the existing collective bargaining agreement's progression steps and wage rates, but added a merit pay system to those rates. The proposal stated that employees would receive additional merit increases "based on their individual performance and contribution on their job" and that "[t]he amount and frequency of such merit increase will be determined by the Division Head and

President and will not be subject to the grievance procedure." Pet. App. 31a.

Following the Union's rejection of the Company's offer, the Company notified the Union that it considered the parties to be at impasse and that it would implement its final offer in two weeks. At the parties' bargaining session on September 27, 1984, the Company gave the Union a handout detailing the results of the first set of merit increases. The next day, the Company provided the Union with a written summary of the implementation of the merit system; of the 73 employees, 47 had been reviewed and 44 received increases. On October 30, the Company notified the Union of its review of the remaining employees and listed the merit increases given. Thereafter, the Company sent the Union periodic listings of merit increases that had taken effect the previous month. Pet. App. 31a-32a. In subsequent bargaining sessions, the parties were unable to reach agreement and negotiations ceased after a final meeting on March 27, 1985. *Id.* at 33a.

2. The Board concluded that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (the Act), by unilaterally granting merit wage increases to its employees without consulting with the Union over their timing and amount.[1] Pet. App. 38a. It ordered the Company,

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[1] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(d), 29 U.S.C. 158(d), defines the obligation to bargain as a requirement "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157." Section 7,

inter alia, to bargain on request with the Union over the timing and amount of employee merit wage increases. *Id.* at 40a.

The Board stated that merit wages are a mandatory subject of bargaining, and that the bargaining obligation encompasses a duty to negotiate over the procedures and criteria for granting merit increases to employees. Moreover, "[t]he implementation of a merit pay program, to the extent that implementation involves discretion in determining the amounts or timing of the increases, is a matter as to which the bargaining agent is entitled to be consulted." Pet. App. 34a, citing *NLRB* v. *Katz*, 369 U.S. 736, 745-747 (1962); *Oneita Knitting Mills, Inc.*, 205 N.L.R.B. 500, 500 n.1 (1973). The Board noted that the Company's September 5 merit pay proposal provided "no role for the Union in the initial determination of the increases' timing and amounts" and "also exempted management's decision on these matters from union or employee challenge through the contractual grievance procedure." *Ibid.* The Board concluded that, in proposing "to exclude the Union from this exercise of discretion over employees[']] wages," the Company "was seeking the Union's waiver of its statutory rights under Section 8(a)(5) of the Act." *Ibid.* Such a waiver of bargaining rights under Section 8(a)(5) will "not be lightly inferred but must be clear and unmistakable." Pet. App. 35a, citing *Tocco Division of Park-Ohio Industries*, 257 N.L.R.B. 413, 414 (1981), enforced, 702 F.2d 624 (6th Cir. 1983). "Here, despite earnest effort, the [Company] was unable to secure the Union's waiver of its right to bargain over the merit increases' timing and amounts." Pet. App. 35a.

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29 U.S.C. 157, guarantees employees "the right * * * to bargain collectively through representatives of their own choosing."

The Board held that the Company could not unilaterally implement its merit pay proposal simply because the parties had bargained to impasse over it. Pet. App. 35a-38a. The Board explained that, although the employer may generally implement changes consistent with its proposals after the parties have reached a good-faith impasse in negotiations, *id.* at 36a, it could not engage in unilateral action that "involved the waiver of [the employees'] statutory right." *Id.* at 38a. The Board concluded that, while "[h]aving reached impasse, the [Company] was free to consider employees for merit increases" on the basis of "individual performance" and "contribution on the job," it was not free, "[h]aving failed to secure a waiver of the Union's statutory right to bargain over the merit increases' timing and amounts, * * * to grant increases without consulting with the Union about these matters." *Id.* at 37a-38a.

3. The court of appeals denied enforcement of the Board's order. The court concluded that the Company was entitled to implement its merit pay proposal after having bargained to impasse with the Union concerning it. Pet. App. 27a-28a. In so holding, the court rejected the Board's view that "an explicit waiver by the Union of its right to bargain [over the frequency and amounts of merit increases] is * * * required," and it concluded "that, given the bargaining history in this case, the Union's statutory right to bargain was vindicated by hard bargaining over merit wage proposals." *Id.* at 18a-19a.

The court relied on *NLRB* v. *American National Ins. Co.*, 343 U.S. 395 (1952), in which this Court held that it does not violate Section 8(a)(5) for an employer to insist in negotiations on a management-rights clause that reserves to the employer the power to act unilaterally with respect to rates of pay, wages, and

hours of employment. The court of appeals deemed that holding to call into question the Board's position that particular merit pay determinations "must be presented to the Union prior to implementation upon impasse." Pet. App. 22a. The court also concluded that the Board's decision improperly limited the Company's use of economic weapons by precluding the Company from implementing its wage proposal at impasse. *Id.* at 25a, citing *NLRB* v. *Katz*, 369 U.S. 736, 745 (1962).

ARGUMENT

1. The issue in this case is one of first impression, and, in our view, the Tenth Circuit erred. The court of appeals held that the statutory right to bargain over the procedures and criteria for granting merit increases does not include the right of the union to participate in determining particular merit increases; rather it encompasses only the right to bargain over whether the union will participate in the process of determining merit increases, and, if so, in what fashion. The court therefore concluded that, once the parties have bargained to impasse over those general issues, the employer is free to implement its proposal by unilaterally granting particular merit increases without consulting the union at all about those actions.

The Board's position is that such unilateral action violates the employer's duty to bargain. Section 8(d) of the Act "encompasses a duty to bargain over the procedures and criteria for granting merit increases" which can be vindicated either by establishing through bargaining the standards for the amounts and timing of such increases, or by providing "for union participation either in the initial determination of merit increases granted to particular employees or

afterwards through the contractual grievance procedure." *McClatchy Newspapers, Inc., Publisher of the Sacramento Bee*, 299 N.L.R.B. No. 156 (Sept. 27, 1990), slip op. 5-6 petitions for enforcement and review pending, Nos. 90-1507 & 90-1602 (D.C. Cir. argued Feb. 3, 1992). Accordingly, while the employer can insist to impasse on a proposal that would vest it with total discretion with respect to merit pay, the employer may not, at impasse, implement such a proposal by unilaterally determining the timing or amount of particular merit increases.

The Board's position is a reasonable interpretation of the Act and is entitled to judicial deference. See, *e.g.*, *Litton Financial Printing Division* v. *NLRB*, 111 S. Ct. 2215, 2222 (1991); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496-497 (1979). The court of appeals' substitution of its own view of industrial policy for that of the Board constitutes error.

Contrary to the suggestion of the court of appeals, the Board's position does not conflict with this Court's decision in *NLRB* v. *American National Ins. Co.*, *supra*. There, the Court decided only that it was not *per se* unlawful for an employer to insist, as a condition of reaching agreement during negotiations, on a management-rights clause giving the employer the right to act unilaterally with respect to certain terms and conditions of employment. 343 U.S. at 409. The Court was not presented with, and did not address, the disputed issue here: whether an employer may implement a management rights proposal, upon impasse, when the union has refused to agree to unilateral employer determination of the terms of employment at issue.[2]

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[2] Nor is the issue in this case governed by *NLRB* v. *Katz*, *supra*. In that case, the Court held that an employer "commits

2. Although the court of appeals' decision is incorrect, this Court's review of the issue would be premature. This is the first judicial decision to consider the Board's position concerning an employer's post-impasse unilateral implementation of a proposed discretionary merit increase system. Moreover, the identical issue is now before the D.C. Circuit in *McClatchy Newspapers, Inc.* v. *NLRB*, *supra*.

The cases cited by petitioner (Pet. 8-9) do not establish a conflict in the circuits on this issue. In *NLRB* v. *J.H. Allison & Co.*, 165 F.2d 766, 768 (6th Cir. 1948), the court, upholding the Board's decision, rejected the employer's contention that it never had to bargain about individual merit increases because such raises were a management prerogative. In *NLRB* v. *Blevins Popcorn Co.*, 659 F.2d 1173, 1189 (D.C. Cir. 1981), the court agreed with the Board that the employer was not privileged to withhold, during negotiations, a preexisting discretionary wage increase without consulting the union. Neither case involved the issue here: whether the employer satisfies its statutory obligation to bargain over individual merit increases by insisting to impasse on a proposal to make those determinations unilaterally. *Toledo Typographical Union No. 63* v. *NLRB*, 907 F.2d 1220 (D.C. Cir. 1990), like *American National Insurance*, involved the issue of whether the employer could insist to impasse in negotiations on a proposal that eliminates the union's role in defining a condition of employment; the

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an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Financial Printing*, 111 S. Ct. at 2221. The Court had no occasion to consider the distinct question of whether it is permissible for an employer to implement, after impasse, particular unilateral changes under management rights clauses, as the employer did in this case.

court noted that "[w]hether the Employer could thereafter implement the proposal without the Union's consent is not at issue in this case." *Id.* at 1223. Finally, in *Local Union No. 47, IBEW* v. *NLRB*, 927 F.2d 635 (D.C. Cir. 1991), while the court upheld the Board's position that an employer could implement at impasse its final offer made after wage reopener negotiations, it expressly noted that the "flat wage increases" involved there were not "analogous to the merit-pay consultation right at issue in *Colorado-Ute*." *Id.* at 644-645.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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